# Rosli bin Supardi v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B 09–22 OF 2000
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
4 MARCH 2002

***Criminal Procedure*** *— Appeal — Appellate court, power of — Whether High Court may invoke proviso to s 60(1) of the Courts of Judicature Act 1964 — Whether power to invoke such proviso exclusive only to Court of Appeal and Federal Court*

***Criminal Procedure*** *— Appeal — Sentence against — Whether Court of Appeal may enhance sentence in the absence of cross appeal by public prosecutor*

***Criminal Procedure*** *— Sentence — Inadequacy of sentence — Sentence passed by trial court and affirmed by intermediate appeal court manifestly inadequate — Power of Court of Appeal to enhance sentence — Courts of Judicature Act 1964 s 60*

***Criminal Procedure*** *— Trial — Misdirection — Misdirection by trial judge on the standard of proof — Misdirection not occasioning any failure of justice — Whether misdirection curable — Criminal Procedure Code s 422*

The appellant was convicted and sentenced to a term of six years' imprisonment and three strokes of the rotan for an offence under s 326 of the Penal Code. He appealed to the High Court contending, inter alia, that the sessions court judge had misdirected herself on the standard of proof that she applied at the close of the whole case. The High Court dismissed the appeal and affirmed the sentence. The High Court judge concluded that no miscarriage of justice had occurred. He applied the proviso to s 60(1) of the Courts of Judicature Act 1964 instead of s 422 of the Criminal Procedure Code. The appellant appealed against the judgment of the High Court to the Court of Appeal. The public prosecutor did not cross appeal. In the Court of Appeal, counsel for the appellant argued that: (a) the misdirection in the judgment the sessions court was not curable under s 422 of the Criminal Procedure Code; (b) the High Court judge erred by applying s 60 of the Courts of Judicature Act 1964; (c) the Court of Appeal should not interfere with sentence because: (i) the appellant had defended himself for a large part of the trial and may not have appreciated the seriousness of the case; (ii) it is bad policy for the Court of Appeal to exercise its power to enhance sentence in the absence of a cross appeal by the public prosecutor; and (iii) the appeal was pursued before the Court of Appeal to canvass a point of obvious importance to the Criminal Bar. The deputy public prosecutor suggested the Court of Appeal not interfere with sentence as the appellant had no further avenue for appeal.

**Held**, dismissing the appeal and enhancing the sentence:

(1) On the facts, s 422 was applicable. A very careful scrutiny of the evidence on record revealed sufficient evidence of a highly

convincing character that established the guilt of the appellant even upon the application of the correct test. The defence was rightly called and the appellant was properly convicted. The misdirection on the standard of proof had not occasioned any failure of justice (see p 262D–F); *Ishak Shaari v PP* [1997] 3 CLJ Supp 223, overd *Harun Abdullah v PP* [1998] 3 MLJ 1 distinguished and *Tunde Apatira v PP* [2001] 1 MLJ 259 followed.

(2) It was not open to the High Court judge to rely on the proviso to s 60(1) of the Courts of Judicature Act 1964. The proviso is exclusive to the Court of Appeal and to the Federal Court. There is however no essential difference between the proviso to s 60(1) of the Courts of Judicature Act 1964 and s 422 of the Criminal Procedure Code. Thus in the instant case, the erroneous invocation of the proviso to s 60(1), though an error, produced no substantial miscarriage of justice (see p 262B–D); *Tunde Apatira v PP* [2001] 1 MLJ 259 followed.

(3) The circumstances in which the offence was committed was particularly barbaric. The sentence passed by the sessions court and affirmed by the High Court was manifestly inadequate and the Court of Appeal was empowered under s 60 of the Courts of Judicature Act 1964 to enhance the sentence. Counsel's first argument against interference with sentence could not be accepted since if accepted, it would mean that in a case where the accused chose to defend himself, some more special consideration ought to be accorded than in a case where he is not represented. With regard to counsel's third argument, the fact that the appellant had the academic interest of the legal profession at heart was neither here nor there (see p 262F–G).

(4) With regard to counsel's second argument, as a general rule it is bad policy for the Court of Appeal to enhance the sentence in the absence of a cross appeal by the public prosecutor. However every case depends on its own facts. In the instant case, the sentence imposed did not even attempt to meet the public interest nor did it have any relation to the aggravated circumstances in which the offence was committed. The sentence of six years' imprisonment and three strokes of the rotan was manifestly inadequate, and should be set aside and substituted with 12 years' imprisonment from the date of arrest and five strokes of the rotan (see p 263D–G).

**[Bahasa Malaysia summary**

Perayu telah disabitkan dan dijatuhkan hukuman pemenjaraan selama enam tahun dan tiga kali sebatan rotan bagi satu kesalahan di bawah s 326 Kanun Keseksaan. Beliau telah merayu kepada Mahkamah Tinggi dengan menegaskan, antara lainnya, bahawa hakim mahkamah sesyen telah tersalah arah akan dirinya sendiri ke atas

standard bukti yang telah beliau pakai pada penutupan keseluruhan kes tersebut. Mahkamah Tinggi telah menolak rayuan tersebut dan mengesahkan hukuman tersebut. Hakim Mahkamah Tinggi memutuskan bahawa tiada salah laksana keadilan telah berlaku. Beliau telah memakai proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964 dan bukannya s 422 Kanun Acara Jenayah. Perayu telah merayu terhadap penghakiman Mahkamah Tinggi kepada Mahkamah Rayuan. Pendakwa raya tidak merayu balas. Dalam Mahkamah Rayuan, peguam bagi pihak perayu berhujah bahawa: (a) salah arahan di dalam penghakiman mahkamah sesyen tidak dapat dipulihkan di bawah s 422 Kanun Acara Jenayah; (b) hakim Mahkamah Tinggi tersalah pertimbangan dengan memakai s 60 Akta Mahkamah Kehakiman 1964; (c) Mahkamah Rayuan tidak seharusnya menganggui hukuman kerana: (i) perayu telah membela dirinya sendiri bagi sebahagian besar daripada perbicaraan tersebut dan mungkin tidak mengetahui akan sifat serius kes tersebut; (ii) ianya merupakan dasar yang tidak berpatutan bagi Mahkamah Rayuan melaksanakan kuasanya demi mempertingkatkan hukuman apabila tiada rayuan balasan oleh pendakwa raya; dan (iii) rayuan tersebut telah diteruskan di hadapan Mahkamah Rayuan untuk meneliti satu perkara yang jelas sangat penting kepada Majlis Jenayah. Timbalan pendakwa raya telah menyarankan supaya Mahkamah Rayuan tidak mencampuri dengan hukuman kerana perayu tiada jalan seterusnya untuk merayu.

**Diputuskan**, menolak rayuan dan menambahkan hukuman:

(1) Berdasarkan fakta-fakta, s 422 boleh dipakai. Penelitian dengan penuh hemat akan keterangan yang dicatatkan menunjukkan keterangan memadai mengenai sifat yang amat mempengaruhi yang telah menetapkan kesalahan perayu meskipun atas pemakaian ujian yang betul. Pembelaan telah dipanggil tepat pada masanya dan perayu telah disabitkan dengan sempurna. Salah arahan ke atas standard bukti telah tidak menyebabkan sebarang kegagalan keadilan (lihat ms 262D–F); *Ishak Shaari v PP* [1997] 3 CLJ Supp 223 ditolak, *Harun Abdullah v PP* [1998] 3 MLJ 1 dibeza dan *Tunde Apatira v PP* [2001] 1 MLJ 259 diikut.

(2) Ianya adalah tidak terbuka pada hakim Mahkamah Tinggi untuk bergantung pada proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964. Peruntukan itu adalah eksklusif pada Mahkamah Rayuan dan kepada Mahkamah Persekutuan. Namun begitu tidak terdapat perbezaan penting antara proviso kepada s 60 Akta Mahkamah Kehakiman 1964 dan s 422 Kanun Acara Jenayah tersebut. Oleh itu dalam kes semasa, penggunaan secara salah proviso kepada s 60(1), meskipun satu kesilapan, tidak menghasilkan salah laksanaan keadilan yang substansial (lihat ms 262B–D); *Tunde Apatira v PP* [2001] 1 MLJ 259 dikut.

(3) Keadaan dalam mana kesalahan tersebut telah dilakukan adalah khususnya kejam sekali. Hukuman yang dijatuhkan oleh mahkamah sesyen dan disahkan oleh Mahkamah Tinggi adalah jelas tidak memadai dan Mahkamah Rayuan telah diberi kuasa di bawah s 60 Akta Mahkamah Kehakiman 1964 untuk menambah hukuman tersebut. Hujahan pertama peguam terhadap gangguan dengan hukuman tidak boleh diterima kerana jika diterima, ianya akan bermaksud bahawa di dalam sesuatu kes di mana memilih untuk membela dirinya sendiri, pertimbangan yang lebih harus diberikan dari sesuatu kes di mana beliau tidak diwakili. Berhubung hujahan ketiga peguam, hakikat bahawa perayu mempunyai minat akademik profesyen undang-undang pada sanubarinya tidak di sini mahupun di sana (lihat ms 262F–G).

(4) Berhubung hujahan kedua peguam, pada umumnya ianya adalah dasar yang tidak wajar untuk Mahkamah Rayuan menambah hukuman kerana ketiadaan rayuan balas oleh pendakwa raya. Walau bagaimanapun setiap kes bergantung pada fakta-faktanya yang tersendiri. Dalam kes semasa, hukuman yang dikenakan tidak pun cuba untuk memenuhi kepentingan awam dan tidak pun mempunyai sebarang perhubungan dengan keadaan-keadaan teruk dalam mana kesalahan tersebut telah dilakukan. Hukuman pemenjaraan selama enam tahun dan tiga kali sebatan rotan adalah amat tidak memadai, dan haruslah diketepikan dan digantikan dengan 12 tahun pemenjaraan daripada tarikh penahanan dan lima kali sebatan rotan (lihat ms 263D–G).]

**Notes**

For cases on appellate court, power of, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 215–218.

For cases on inadequacy of sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3212–3246.

For cases on misdirection, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4105–4107.

For cases on sentence, appeal against, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 558–574.

**Cases referred to**

*Harun bin Abdullah v PP* [1998] 3 MLJ 1 (distd)
*Ishak Shaari v PP* [1997] 3 CLJ Supp 223 (overd)
*PP v Ku Yahya Ku Bahari & Anor* (RJ No A06–(B)–1–99) (refd)
*Tunde Apatira & Ors v PP* [2001] 1 MLJ 259 (folld)

**Legislation referred to**

Courts of Judicature Act 1964 s 60
Criminal Procedure Code s 422

**Appeal from:** Criminal Appeal No 42–32 of 1998 (High Court, Shah Alam)

*Manmohan Singh Kang* (*Kang & Kang*) for the appellant.
*Muniandy Kannyappan* (*Nurulhuda Nur'aini bte Mohd Nor* with him) (AG's Chambers) for the respondent.

**Gopal Sri Ram JCA** (delivering the judgment of the court): This appeal arose from the decision of the High Court Shah Alam dismissing an appeal to it from the sessions court. The appellant before us was charged before the sessions court for an offence under s 326 of the Penal Code. He defended himself during part of the case. During the later part of the trial, Mr Manmohan Kang appeared for him and conducted an able defence on behalf of the appellant. At the close of the whole case, the appellant was convicted and sentenced to a term of six years' imprisonment and three strokes of the rotan. He was dissatisfied with the decision of the sessions court and as we mentioned a moment ago, he took his case further to the High Court.

One of the complaints advanced on his behalf in the High Court was that the learned sessions court judge had misdirected herself on the standard of proof that she applied at the close of the whole case. The specific complaint made to the High Court, and before us this morning is that the sessions court judge asked herself the wrong question. It is said that she merely stated that the appellant had failed to raise a reasonable doubt on the prosecution's case without first making a prior finding that the prosecution had indeed established its case beyond reasonable doubt.

The learned High Court judge, having applied his mind to the material before him, came to the conclusion that no miscarriage of justice had occurred because of the misdirection by the sessions court on the standard of proof. He then purported to apply the proviso to s 60(1) of the Courts of Judicature Act 1964 which he thought was wider in scope and application than s 422 of the Criminal Procedure Code.

In arguing the appeal before us, Mr Manmohan Kang, counsel for the appellant, has made two important submissions. He first argued that the misdirection contained in the judgment of the sessions court is not curable under s 422 of the Code. Second, he submits that the learned judge of the High Court fell into error by applying the proviso to s 60(1) of the Courts of Judicature Act 1964. Before we address each of these arguments, it is useful to remind us of the precise terms of s 422. This is what it says:

> Irregularities not to vitiate proceedings
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> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence; or

A unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

In *Ishak Shaari v PP* [1997] 3 CLJ Supp 223, Augustine Paul JC (as he then was) came to the conclusion that the section could not be applied to cure an illegality or nullity, such as the case in which there is a breach of an B express provision of the code or a breach of principle of general importance in the administration of justice. His conclusion on the law was upheld by this court in *Harun bin Abdullah v PP* [1998] 3 MLJ 1. Abdul Malek Ahmad JCA in delivering the judgment of this court, said at p 9 of the judgment:

C Of these three decisions, we must say that we are in full agreement with the decision in *Ishak Shaari v PP* where the learned trial judge held that s 422 of the CPC (Criminal Procedure Code) cannot be invoked to cure a breach where it involves the breach of an explicit provision of the Criminal Procedure Code or where the breach involves a principle of general importance in the administration of justice. And as the error committed by the learned sessions court judge in misdirecting herself on the standard of proof on the prosecution D fell within both the classifications in the instant appeal, it was incapable of rectification under s 422 of the Criminal Procedure Code.

Our attention has also been drawn by the learned deputy public prosecutor to the unreported judgment of this court in *PP v Ku Yahya Ku Bahari & Anor* (RJ No A06–(B)–1– 99) where on a complaint of misdirection on the E standard of proof, a retrial was ordered by the High Court. The public prosecutor's appeal was dismissed by this court. This court affirmed and followed its decision in *Harun bin Abdullah*.

Both *Ishak Shaari* and *Harun Abdullah* were relied upon by learned counsel for the appellant before us. But we find *Harun Abdullah* readily distinguishable from the present case. In *Harun*, this court having come to F the conclusion that s 422 cannot be invoked to cure a misdirection by the trial court on the issue of standard of proof by the prosecution, went on to undertake an exhausted review of evidence. It then found that at p 12:

... applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would G certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.

In other words, this court was satisfied that if s 422 had been invoked, it could not, on the facts of the case, have cured the failure of justice that had H been occasioned to the appellant in that case. To put it shortly, the section did not apply because a proper direction on the standard of proof would have resulted in an acquittal of the appellant.

So far as *Ishak Shaari* is concerned, it no longer in our view represents the law. For in *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259, a full Federal Court found that in an exceptional case where the evidence is clear and I cogent, an appellate court may affirm a conviction despite a misdirection. In the course of its judgment, the Federal Court observed that there was no material difference between the phrase 'miscarriage of justice' in the proviso

to s 60(1) of the Courts of Judicature Act 1964 and the phrase 'failure of justice' appearing in s 422 of the Code. There is therefore, serious doubt in our minds as to the correctness of the proposition made in *Ishak Shaari* that a misdirection as to the standard of proof must automatically and without more result in a setting aside of a conviction despite s 422 of the Criminal Procedure Code.

We now turn to address the second argument. There is nothing much to be said about it. The decision in *Tunde Apatira* is a complete answer to the complaint now advanced before us. We, of course entirely agree with the submission of the learned counsel for the appellant that it was not open to the learned High Court judge to rely on the proviso to s 60(1) of the Courts of Judicature Act 1964. That proviso is exclusive to this court and to the Federal Court. As far as High Courts are concerned, they must act within the confines of s 422. But the error of the learned judge in applying the wrong provision, matters not a jot here. Since *Tunde Apatira*, there is no essential difference between the proviso to s 60(1) and s 422. They mean the same thing. The erroneous invocation of the proviso to s 60(1), though an error, has produced no substantial miscarriage of justice. For these reasons, we find no merit in this submission.

However for completeness, having found that s 422 is applicable, as argued by the learned deputy public prosecutor, we have conducted a very careful scrutiny of the evidence on record with a view to ascertain whether a different result would have ensued had the correct test been applied as to the standard of proof, both at the close of the prosecution's case and at the close of the whole case. Having done so, we are entirely satisfied that there is sufficient evidence of a highly convincing character that establishes the guilt of the appellant even upon the application of the correct test. In other words, the defence was rightly called and the appellant was properly convicted. So, the misdirection on the standard of proof has not occasioned any failure of justice. In these circumstances, there is no merit in the complaint against conviction and the appeal against conviction is therefore dismissed.

We now turn to sentence. This is a very serious case. The circumstances in which the complainant PW5's throat was cut several times is particularly barbaric. Sentence passed by the trial court and affirmed by the intermediate appeal court is, in our carefully considered view, manifestly inadequate. This court has power under s 60 of the Courts of Judicature Act 1964 to enhance the sentence imposed either by the sessions court or the High Court. The question is whether we should exercise the power on the facts of the present case. Mr Manmohan Kang has in a very able and carefully developed argument advanced three grounds based on which he says we should not interfere here. First, because the appellant had defended himself for a large part of the trial and therefore may not have appreciated the seriousness of the case. Second, because it is bad policy for this court to exercise its power particularly in the face of an absence of a cross appeal by the public prosecutor. Thirdly, because this appeal was pursued before us to canvass a point of obvious importance to the Criminal Bar. Of these reasons, we find that we need to address only on the second. We would do

that in a moment. So far as the first is concerned, it is without any basis. An acceptance of counsel's argument would mean that in any case where the accused chose to defend himself, some more special consideration ought to be accorded than to a case where he is not represented. That cannot be it. An accused defends himself or engages counsel as a matter of choice. And if he should exercise his choice one way or the other, who are we to criticize that? Particularly it is so when there is an extremely active legal aid service afforded by the Bar Council and State Bar Committee at the grass root level so that legal representation is made that much easier these days. As far as the third ground is concerned, the appellant who comes before us runs the risk of any order we may make. The fact that he has the academic interest of the legal profession at heart is neither here nor there.

That brings us to the second and most important ground. It is a matter of policy. And it is an important point. As Mr K Muniandy, the learned deputy public prosecutor, with his usual eminent fairness points out that this is the final court so far as this appeal is concerned. He thereafter suggested that we should not interfere with the sentence purely because the appellant has no further avenue. We are fully conscious of the policy consideration of such cases of this nature. We agree with both Mr Manmohan Kang and the learned deputy public prosecutor that as a general rule it would be bad policy for this court to enhance the sentence in the absence of a cross-appeal by the public prosecutor. But every case depends on its own facts. And the gory details of the present case from the evidence rehearsed before us by the learned deputy public prosecutor makes this an exceptional case. As we said when we commenced this judgment, this is a serious case. The sentence imposed does not even attempt to meet the public interest nor does it have any relation to the aggravated circumstances in which the offence was committed. We would be plainly failing in our duty, to our conscience and to the public if we did not interfere in this case. Having regard to the facts and the circumstances of the appellant's case and giving public interest the weight it deserves, we are satisfied that the sentence passed is manifestly inadequate, we would therefore, take these considerations into account and the other circumstances advanced in plea of mitigation before the sessions court, we would set aside the sentence of six years and substitute in place with 12 years' imprisonment from 30 September 1994 (date of arrest). We would also set aside the sentence of three strokes of the rotan and substitute in place with five strokes. The orders of the sessions court are altered to this effect.

*Appeal dismissed and sentence enhanced.*

Reported by Andrew Christopher Simon